THE POWER OF THE INTERSTATE COMMERCE COMMISSION TO PRESCRIBE MINIMUM RATES

INCLUDED among the additional powers conferred upon the Interstate Commerce Commission by the Transportation Act, 1920, is the power to "prescribe what will be the just and reasonable individual or joint rate, fare or charge . . . to be thereafter observed . . . or the maximum or minimum, or maximum and minimum to be charged" by any common carrier subject to the Interstate Commerce Act;[1] but nowhere, either in the Transportation Act or in the Interstate Commerce Act, is there any provision specifically defining the considerations which are to govern the Commission in determining what is a just and reasonable minimum rate, except in the amendment to Section 13 of the Interstate Commerce Act where the power to fix minimum rates is specifically authorized in order to prevent discrimination against persons or localities, or against interstate commerce.[2]

In fact, the Act is surprisingly vague in devolving upon the carriers the duty to avoid unreasonably low rates. It is true that there are the provisions that rates shall be just and reasonable and that they shall not create undue preference or prejudice; provisions referred to in the section of the Act creating the minimum rate power in the Commission;[3] but prior to the passage

[1] 41 STAT. AT L. 456, 484–485. This provision is incorporated by the Transportation Act in Section 15 of the Interstate Commerce Act; Title IV of the Transportation Act being made up of amendments to the Interstate Commerce Act. See also paragraph (*c*) of Section 7 of the Interstate Commerce Act (41 STAT. AT L. 456, 483), which authorizes the Commission to establish minimum proportional rates to and from ports to which the traffic is brought, or from which it is taken, by a water carrier.

[2] 41 STAT. AT L. 456, 484.

[3] This section authorizes the Commission when it "shall be of the opinion that any individual or joint rate, fare or charge . . . is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act . . . to determine and prescribe what will be the just and reasonable individual or joint rate,

of the Transportation Act the first of these provisions had been understood as prohibiting rates that were too high,[4] and it requires a mental *volteface* to construe it as prohibiting rates that are too low. However, the rule that rates shall be "reasonable" was reënacted as an integral part of the Transportation Act,[5] and it may well be that it acquires a new meaning in the light of the other amendments incorporated in the Interstate Commerce Act by this legislation, a conclusion which, to some extent, will be postulated in this discussion, although the con-

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fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged . . .," etc., 41 STAT. AT L. 485.

[4] In fact, the Commission long ago decided that the provision of the Act requiring that "all charges shall be reasonable and just" did not authorize the Commission to hold a rate unreasonably low and therefore in violation of the Act. *Re* Chicago, St. Paul & Kansas City Ry. Co., 2 I. C. R. 137 (1888). This question is discussed at length by Judge Cooley, at pages 146 and 147, and the importance of the opinion is emphasized by the fact that it seems to have met with the full approval of the Supreme Court, since, in I. C. C. *v.* Cincinnati, N. O., & T. P. Ry. Co., 167 U. S. 479, 511 (1897), the Court says:

"The opinion in that case, prepared by Commissioner Cooley, and with his usual ability, while seeking to prove that under the provisions of the statute the commission has no power to prescribe a minimum or to establish an absolute rate but only to fix a maximum rate, goes on further to show how the operation of other provisions of the act tend to secure just and reasonable rates. Were it not for its length, we should be glad to quote all that he says on the subject. We think that nearly all of the argument which he makes to show that the commission has no power to fix a minimum or establish an absolute rate, goes also to show that it has no power to prescribe any tariff, or fix any rate to control in the future."

The opinion of Judge Cooley also points out sundry parts of the Interstate Commerce Act which indirectly operate to deter the carriers from establishing unduly low rates. However, in this article only those which operate with some directness are considered.

Shortly thereafter, *viz.*, in 1893, the Commission recommended that it be granted the minimum rate power, the principal reasons suggested being, (*a*) to prevent the carrier from being deprived of revenue that it ought to have, (*b*) to prevent discrimination, and (*c*) to prevent an unfair distribution of the burden of the cost of transportation: REPORT OF THE INTERSTATE COMMERCE COMMISSION FOR 1893, 38–39, 78.

[5] 41 STAT. AT L. 456, 475. Substantially the same provision has been in the Act since its passage in 1887. As originally enacted, it read:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

siderations which will be adduced are believed to support the propriety of this construction of the word.

But, while the minimum rate is referred to in conjunction with the maximum rate, it is obvious that the standard by which it is to be measured must differ fundamentally from the standard by which the maximum rate is to be measured. The power to establish maximum rates is exerted for the purpose of preventing undue or extortionate exactions from the patrons of an industry subject to regulation, and it is clear that no such purpose is to be subserved by a power which prescribes a charge which the industry may not reduce; and, while the provision of the Interstate Commerce Act which imposes upon common carriers the duty to establish just and reasonable rates,[6] etc., makes no distinction as between rates which may be unjust or unreasonable because too high, and rates which may be unjust or unreasonable because too low, and while the section of the Act which confers upon the Interstate Commerce Commission authority to enforce the obligations established by other sections [7] prescribes no definite rules to control its decisions, manifestly wholly different considerations must obtain in the two classes of cases. For the question is not answered by concluding that rates must be reasonable in the sense that they must be neither too high nor too low, since this only postpones the difficulty and still leaves for determination the criteria by which it must be ascertained whether they are too high or too low.

To ascertain the standard or standards by which minimum rates should be fixed requires a determination of the principles which should govern the solution of the problem, principles which are as yet scarcely in a formative stage and are almost wholly untried in practice. At the same time, the problem, in its practical aspect, is of immediate and far-reaching importance. The purpose of this article is not so much to arrive at final conclusions as to consider in a tentative way the principles which should probably be invoked in determining a minimum rate.[8]

[6] 41 STAT. AT L. 456, 475.

[7] 41 STAT. AT L. 456, 484–485.

[8] The reports of the committees of Congress having charge of the bill furnish very limited information as to the purposes Congress had in mind in granting the minimum rate power. In the report of Mr. Esch from the Committee on Interstate and Foreign Commerce of the House, submitted November 10, 1919

Since prior provisions of the Interstate Commerce Act may possibly disclose legislative policies which will be helpful in considering the proper interpretation of the recent amendments, they will be considered first.[9]

1. Federal Regulation of Unduly Low Rates prior to the Transportation Act, 1920

Even prior to the Transportation Act, 1920, there were, to a limited extent, restrictions upon the reduction of railroad rates or their maintenance at a relatively low level. Thus the Interstate Commerce Act provided, in Section 4, paragraph 2,[10] that

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase

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(Report No. 456), the following statement occurs under the caption, "Minimum and Maximum Rates" (page 19):

"Under section 412 the commission is authorized to fix minimum as well as maximum rates. Under the Interstate Commerce act the commission ever since 1887 has only been empowered to declare the maximum rate to be charged. As a result of the testimony the committee believes that the commission should also be granted authority to prescribe joint rates, or maximum, or minimum, or maximum and minimum joint rates. With this power the commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service, by establishing a minimum, below which such carrier could not fix its rate. It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels. The power to fix minimum rates will also enable the commission to adjust many cases under the fourth section of the Commerce act, known as the 'long and short haul clause.'"

Furthermore, on page 10 of the report, the Committee says:

"By the application of minimum as well as maximum rates to permit a longer and weaker line to get a greater share of the business than heretofore, and with the initiative in the commission to establish joint rates and through routes, and the division of the rates, would still further aid the short or weaker lines."

In the report of Senator Cummins from the Senate Committee, also filed on November 10, 1919 (Report No. 304), the matter of minimum rates is not specifically discussed.

[9] In this connection the opinion of Judge Cooley in *Re* Chicago, St. Paul & Kansas City R. Co., 2 I. C. R., 137 (1888), is well worth examination: see especially page 147.

[10] 36 Stat. at L. 539, 548.

such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

The obvious purpose of this paragraph was to prevent the reduction of railroad rates for the purpose of destroying water competition, and this provision suggests a consideration which may now be invoked to guide the Interstate Commerce Commission in the exercise of its new power, *viz.*, a railroad rate may be regarded as being unduly low and as creating unfair competition because of the effect that it may have on transportation by water.[11] In other words, instead of imposing upon the railroad the mere persuasive consideration that, if it attempts to meet the water competition by reduction of rates, it shall not thereafter increase such rates except under the conditions specified, Congress now authorizes the Commission, in the first instance, to prevent such competition if, in its judgment, it will have destructive effect upon the water competition. That this may indicate a possible basis for action by the Commission is confirmed by the provision of Section 500 of the Transportation Act, 1920,[12] that, "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

Furthermore, this possible consideration suggests that a similar basis for the exercise of the Commission's new power may be found in cases where a low level of rates sought to be maintained by one carrier is seriously detrimental to the rate basis currently in effect on the line of another carrier, and therefore, in the circumstances, discloses an unwise and possibly unfair competition, particularly in view of the federal policy "to foster and preserve in full vigor both rail and water transportation." This will be more fully discussed hereafter.

In addition to the provision of Section 4 of the Interstate Commerce Act relating to the reduction of rates to meet water

[11] That this was one of the objects sought to be accomplished by the grant of the minimum rate power seems clear from the report of Mr. Esch from the Committee of the House, quoted in note 8, *supra*.

[12] 41 STAT. AT L. 456, 499.

competition, the same section also prohibited,[13] except under certain circumstances, the charge of a greater compensation for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included in the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of the Act. This so-called "Long and Short Haul Clause" has been amended from time to time, but always with a tendency to greater rigidity,[14] and there has been a definite disposition on the part of the Interstate Commerce Commission to apply the rule with increasing strictness. In fact, the amendment contained in the Transportation Act provides that the Commission shall not permit the establishment of any charge to or from the more distant point that is not "reasonably compensatory" for the service performed, a provision the precise significance of which has not as yet been determined, but one which is evidently intended as a safeguard against unduly low rates. Questions constantly arise under the clause, and the difficulty of determining the instances in which rates to the more distant points may be made less than the rates to the nearer points invites a discussion of the relation of the minimum rate power to this requirement of the Act.

Thus, in a recent proceeding before the Interstate Commerce Commission,[15] western railroads have petitioned for relief from the operation of the Fourth Section, so that they may maintain to Chicago from San Francisco and other sugar producing points in California a rate of 48 cents per hundred pounds, while, at the same time, they maintain to an intermediate point, *e.g.*, Omaha, Nebraska, a rate of 64 cents. The purpose of this application is to enable these western carriers to bring sugar

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[13] 36 STAT. AT L. 539, 547.

[14] 24 STAT. AT L. 379, 380; 36 STAT AT L., 539, 547; 41 STAT. AT L. 456, 480. An interesting summary of the history of this section will be found in FRANK HAIGH DIXON, RAILROADS AND GOVERNMENT, 28–42, 253–254. In Coffee from Galveston, etc., 64 I. C. C. 26 (1921) the Commission says: "The tendency of both Congress and the Commission in recent years has been to restrict more and more the granting of fourth section relief."

[15] *In re* Rates on Sugar from California and other Western Producing Points to Chicago and Intermediate Points: Fourth Section Application No. 8835.

from western points of production in competition with sugar moving to the same consuming territory from the Atlantic seaboard and from the Gulf of Mexico. In this case, the haul of the western lines is about 2400 miles as compared with the haul of the eastern carriers from New York of about 900 miles. Prior to the passage of the Transportation Act, 1920, the standards which apparently governed the Interstate Commerce Commission in determining the granting or refusing of relief under the Fourth Section, seem to have been confined to circumstances and conditions prevailing on the line of the carrier asking to charge the lower rate to the more distant point; but in this instance, the Commission is asked to take into view conditions obtaining on the eastern lines and to hold that such a rate adjustment constitutes unfair competition as against the eastern carriers in that it involves an invasion, as it were, of a market that they might reasonably expect to supply.

When, in 1910, the Fourth Section of the Interstate Commerce Act was so amended as to prohibit lower rates to the more distant points than those that obtain to the intermediate shorter distant points on the same line, except in cases where the Interstate Commerce Commission should grant relief, the contention was made that no standard was given the Commission to govern it in the exercise of its power of dispensation; but the Commission held [16] — and was sustained by the Supreme Court in so holding — that this power was to be exercised in conformity with the other provisions of the Act, and particularly in obedience to the requirements of Section 3 prohibiting undue preference, etc. The so-called long and short haul clause is, essentially, a prohibition of a specific kind of preference; and whether it is due or undue, is usually determined by considerations substantially like those which determine whether there is or is not a violation of Section 3 of the Act. The result has been that the standards which have determined the action of the Interstate Commerce Commission in the exercise of its power of dispensa-

[16] R. R. Com. of Nevada *v.* S. P. Co., 21 I. C. C. 329 (1911); Intermountain Rate Cases, 234 U. S. 476 (1914). The Supreme Court also sustained the Commission in its claim to authority to determine the extent to which the long and short haul provision might be violated, in other words, to prescribe the differentials.

tion under Section 4 have been standards depending on the situation on the line of the petitioning carrier, and not on other lines. The question now presented is whether the Transportation Act, 1920, has not enlarged this power so as to permit the Commission to take into view the effect on other carriers of granting Fourth Section relief to the petitioning carrier.[17]

In like fashion, the prohibition of Section 2 of the Interstate Commerce Act against discrimination and the prohibition of Section 3 against undue preference have operated to affect the level of freight rates and to prevent reductions which might otherwise have been made. Section 3 permits the Interstate Commerce Commission to establish a relationship of rates and is the section under which, even prior to the Transportation Act, the Commission was empowered to regulate the relation between interstate and intrastate rates because of undue preference, etc., to persons or localities.[18] Where, under this section, the Interstate Commerce Commission had determined that a certain level of rates might reasonably be charged in connection with interstate commerce, an order of the Commission establishing a definite relationship as between the interstate and the intrastate rates justified the increase of the intrastate rates even as against countervailing orders of state authorities.[19] Here again, however, the effect of the law as regards the minimum rate was persuasive only, since the carriers, by reducing the higher rates, could have selected the lower level for both rates if they so desired.

Furthermore, this power of the Interstate Commerce Commission under Section 3 was available only when one carrier

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[17] That Congress had before it the relation of the minimum rate to the long and short haul clause seems clear from the report of Mr. Esch, of the Committee of the House, quoted in note 8, *supra*. And just as, prior to the Transportation Act, this requirement of the statute justified a condemnation of a low rate that might violate it, Rice Products to Jackson, Miss., 44 I. C. C., 364 (1917), so also it does to-day, Salt from Louisiana Mines, 66 I. C. C. 81 (1922).

[18] R. R. Comm. of La. *v.* St. Louis, S. W. Ry. Co., *et al.*, 23 I. C. C., 31 (1912); Houston, East & West Texas Ry. *v.* United States, 234 U. S. 342 (1914); American Express Co. *v.* Caldwell, 244 U. S. 617 (1917); Illinois Central R. R. *v.* Illinois, 245 U. S. 493 (1918).

[19] Texas & Pacific Ry. Co. *v.* United States, 205 Fed. 380, 389–390 (Comm. Ct., 1913); Houston, East & West Texas Ry. *v.* United States, 234 U. S. 342, 360 (1914).

treated two patrons differently or participated in different treatment of two patrons;[20] so that, if the *X* railroad, handling in interstate commerce a given commodity from point *A* to point *B*, charged 60 cents per ton, and this charge constituted a reasonable rate, while the *Y* railroad, handling in interstate commerce the same commodity from point *C* to point *B* charged a rate of 30 cents per ton, there was no power in the Interstate Commerce Commission to deal with the situation thus presented, irrespective of the fact that the producers at *A* might be wholly excluded from the common market, *B*, because of the lower rate available to the producers at *C*. One of the important questions arising under the new legislation is whether the minimum rate power operates to confer upon the Interstate Commerce Commission any authority in the circumstances described.

2. The Enlargement of the Commission's Power under the Transportation Act

No provision of the sections of the Act dealing with the minimum rate power limits in any way the authority of the Interstate Commerce Commission to exert any of its other powers under the Act which, persuasively or otherwise, prevent the reduction of rates or the maintenance of relatively low rates. But the new provision evidently contemplates something more; and, since it does not provide specifically the standards which are to determine whether rates are too low to be just and reasonable — except as stated above in the matter of discrimination — it seems clear that the criteria to determine the proper minimum rate must be found in the general requirements of the Act and the results which it is intended to accomplish.

The important provisions which conceivably have application to the question are the provision of Section 1 that rates shall be just and reasonable,[21] the provision of Section 2 that they shall not be discriminatory,[22] the provision of Section 3 that they shall not create undue preference,[23] the provisions of

[20] Central R. R. Co. of N. J. *v.* United States, 42 Sup. Ct. Rep. 80 (1921). But in a proper case it could be exercised to suspend a proposed reduction. Suspension of Rates on Packing-House Products, 21 I. C. C. 68 (1911).

[21] 41 Stat. at L. 456, 475.

[22] 41 Stat. at L. 456, 479.

[23] 24 Stat. at L. 379, 380.

Section 4 already described,[24] the provision of Section 13 that discrimination against persons and localities and against interstate and foreign commerce is forbidden,[25] the provision of paragraph 2 of Section 15a that,

"In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation," [26]

the provision of paragraph 3 of Section 15a that the Commission shall determine the fair return, and in so doing, shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation,[27] and the provision of Section 500 of the Transportation Act, already quoted, declaring that it is the policy of Congress to foster and preserve in full vigor both rail and water transportation.[28]

Some of these provisions were in effect prior to the granting of the minimum rate power, but those imposing upon the Commission the duty to establish rates which will enable the carriers to earn a fair return, and indicating that the purpose of this requirement is to provide the people of the country with an adequate transportation service, suggest important considerations in connection with the minimum rate power. Thus, in the case of *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*,[29] the Supreme Court says:

"It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the

[24] 41 STAT. AT L. 456, 480.
[25] 41 STAT. AT L. 456, 484.
[26] 41 STAT. AT L. 456, 488.
[27] 41 STAT. AT L. 456, 488.
[28] 41 STAT. AT L. 456, 499.
[29] 42 Sup. Ct. Rep. 232, 236 (1922).

purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill."

Having in mind these provisions of the Act, it seems clear that they afford fairly definite criteria by which the Commission may be guided in the exercise of the minimum rate power, and that this is true whether the question be viewed (*a*) from the standpoint of the carrier whose rates are under discussion or (*b*) from the standpoint of other carriers whose rates and revenues may be affected thereby. The subject will be discussed with reference to these two situations.

A. *The Minimum Rate Power as Affected by Considerations Relating to the Carrier Whose Rates are Regulated.*

In view of the fact that it is now declared to be the policy of Congress to foster and preserve in full vigor both rail and water transportation, and since the duty is imposed upon the Interstate Commerce Commission to so adjust the rates of the carriers that they shall earn, under honest, efficient and economical management, a fair return on their property held for and used in the service of transportation, it seems clear that the Interstate Commerce Commission would be justified in prohibiting any reduction of rates or the maintenance of any level of rates which, in the judgment of that tribunal, would tend to deplete the carriers' revenues and to endanger their ability to earn the return which it is the duty of the Commission to secure as nearly as may be. It seems unlikely that a carrier would reduce rates so as to deplete its own revenues, but it is conceivable that, either because of improper influences, or because of mistaken judgment, rates may be established on a level so low as to tend to prevent the earning of the return which is necessary in order to enable the carrier to furnish adequate transportation to the public.

1. *A rate may be unduly low and subject to correction under the Commission's minimum rate power, if it does not meet the cost properly attributable to the service involved.*

A clear instance of this would be found in a case where the carrier, in an effort to secure competitive traffic, might reduce its rates below even the out-of-pocket cost of the service.[30] This would clearly tend to prevent the earning of the desired return. In fact, in the exercise of its power under the Fourth Section, the Commission has consistently held that the lower rate to the more distant point, if permitted, must be sufficient to earn more than the cost of the service of transportation,[31] and the Transportation Act has amended this provision so as to require that the lower rate to the more distant point shall be "reasonably compensatory," a standard not yet clearly defined.

Moreover, the establishment of rates so low that they do not meet the cost of the service, tends almost inevitably to bring about the increase of other rates, a consideration which leads to the second principle.

2. *A rate may be unduly low if it tends to cause increases in other rates of the same carrier.*

This result may ensue from the establishment of a low rate even if it is sufficient to pay the out-of-pocket cost of the service;

[30] In the following cases the Commission, in dealing with proposed reductions, seemed to be governed by its conclusions as to whether the rates were remunerative in and of themselves: Salt from Utah to San Francisco, 61 I. C. C. 58 (1921); Smelter Products from Nevada and Utah, 61 I. C. C. 374 (1921); Petroleum and its Products from Shreveport, 68 I. C. C. 564, 571 (1922)—in this case the Commission apparently regarded the reduction as creating a fairer rate adjustment than that which it superseded; Coal from Detroit, Toledo & Ironton R. R. Co., 69 I. C. C. 112, 113 (1922); Clayed or Cotton, Burlap, Bags from Various Points to Texas Destinations, 69 I. C. C. 458, (1922); Cement from Leeds, Ala., to Virginia Cities, 69 I. C. C. 353 (1922). *Cf.* Proportional Class Rates between Seattle and Tacoma, 69 I. C. C. 197 (1922). The necessity that the reduced rates shall be compensatory is alluded to in Grain Rates from Minnesota, etc., 68 I. C. C. 665 (1922).

[31] See, for example, Commodity Rates to Pacific Coast Terminals, 32 I. C. C. 611, 629 (1915). That this principle was apparently in the mind of Congress seems clear from the report of Mr. Esch from the Committee of the House, quoted in note 8, *supra*. He says: "With this power the commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service, by establishing a minimum below which such carrier could not fix its rate."

and that the principle is one that may properly be invoked is confirmed by the provisions of Section 3 of the Interstate Commerce Act,[32] which prohibit undue preference, etc., to any person or locality, or to any particular description of traffic. While, prior to the amendments added to the Interstate Commerce Act by the Transportation Act, it was questionable whether any undue preference, etc., could be shown unless there was a competitive relation between the different descriptions of traffic,[33] it now seems probable that an undue reduction in rates on a given commodity, or the establishment of rates on such commodity at a relatively low level might be condemned under the minimum rate power because, since it is the policy of Congress to secure adequate rail transportation, such reduction might require, in order that it should be off-set, the increase of rates on other traffic. In order to prevent this and to maintain a proper adjustment of rates as among different commodities, it is conceivable that the Commission would have the authority to prescribe minimum rates in order that there might be no tendency on the part of the carrier to make up reductions by increases elsewhere.[34]

In other words, it is possible that the provisions against undue preference, etc., may now be treated as broad enough to condemn unduly low rates, irrespective of any competitive relationship between the traffic enjoying such rates and other traffic.

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[32] 24 STAT. AT L. 379, 380.

[33] Consumers Company *v.* C. & N. W. Ry., 36 I. C. C. 259, 261 (1915); City Ice & Supply Co. *v.* C. & N. W. Ry., 36 I. C. C. 514, 517 (1915); California Walnut Growers Ass'n *v.* A. & R. R. R. Co., 50 I. C. C. 558 (1918); Portsmouth Ass'n of Commerce *v.* S. A. L. Ry. Co., 55 I. C. C. 377, 380 (1919); Wholesale Coal Trade Ass'n *v.* Director General, 58 I. C. C. 15, 32–33 (1920); Schlicher *v.* Director General, 62 I. C. C. 181, 183 (1921); Tidewater Oil Co. *v.* Director General, 62 I. C. C. 226, 227 (1921).

[34] In the following cases the Commission, in dealing with proposed rate reductions, considered the question whether the reductions would cast an undue burden on other traffic as a relevant fact: Oil from Texas Ports, 63 I. C. C. 74 (1921); Coal from Wyoming Mines, 68 I. C. C. 254, 258 (1922).

3. *A rate may be unduly low which tends to create undue preference as compared with other rates of the same carrier, or joint rates to which the carrier is a party.*

The impropriety of unduly low rates becomes more clear in the case of rates that may be treated as discriminatory,[35] *e.g.*, where a given carrier would establish rates from point *B* to point *A* which are substantially lower than rates on the same commodity to the same destination from point *C*, another point on its line, located on a different division but approximately at the same distance and where the operating conditions are substantially the same. This would be a typical case of violation of Section 3 of the Interstate Commerce Act prohibiting undue preference, even in the absence of the recent amendments; but the power of the Commission would now be adequate to prohibit the discrimination, and, at the same time, to select the rate which is to determine the rate level from both points to the given consuming market, whereas, prior to the grant of the minimum rate power, the exertion of power under Section 3 probably required that the carrier should be allowed to determine which of the alternative methods of eliminating discrimination should be selected.[36] Of course, if the Commission should undertake to determine the level at which the rates should be fixed, it would be necessary that there should be evidence to support its finding in this regard.[37]

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[35] In the following cases the Commission, in dealing with proposed rate reductions, considered the question of undue preference as a relevant fact: Rail-and-Water Rates from Atlantic Seaboard Territory to Texas Points, 61 I. C. C. 740 (1921); Carload Minimum on Sugar, 62 I. C. C. 510 (1921); Oil from Texas Ports, 63 I. C. C. 74 (1921); Coal from Detroit, Toledo & Ironton Mines, 64 I. C. C. 564, 566 (1921); Brick, etc., from Danville, Illinois, to Chicago, 64 I. C. C. 624 (1921); Salt from Louisiana Mines to Chicago, 66 I. C. C. 81, 93 (1922) — although in this case the Commission does not seem to have given consideration to the principle of the decision of the Supreme Court in C. R. R. of N. J. *v.* United States, 42 Sup. Ct. Rep. 80 (1921), which was decided just two days before, *viz.*, December 5, 1921; Reduced Rates on Coal to Kansas City, Mo., 66 I. C. C. 457, 468 (1922); Coal from Illinois to Arkansas, etc., 68 I. C. C. 1 (1922); Sublimed Lead to Trunk Line Points, 68 I. C. C. 343 (1922); Brick, etc., from Danville, Illinois, to East St. Louis, 68 I. C. C. 455 (1922); Grain Rates from Minnesota, etc., 68 I. C. C. 665 (1922); Reduced Rates on Coal to Kansas City, 69 I. C. C. 363 (1922).

[36] Great Northern Ry. *v.* Minnesota, 238 U. S. 340 (1915).

[37] Important illustrations of the exertion of this authority, illustrating its present sweep, are found in the orders of the Commission requiring intrastate

4. *A rate may be unduly low because of its effect upon operation.*

One other consideration has been suggested, *viz.*, that a rate may be so low as to permit unsatisfactory operating conditions. Thus in *Reconsignment of Lumber, etc., at Boston, Indiana*,[38] the Commission condemned a proposed reduction in the charge applicable to the reconsignment of lumber saying:

"The proposed reduction would eliminate any inducement for shippers to give reconsignment instructions before arrival of the car. The result would be a tendency toward congestion of traffic."[39]

5. *A rate which is reasonable as a maximum is not the same as a rate which is reasonable as a minimum.*

It has been suggested that the reasonable minimum rate is the rate that is reasonable as a maximum, in other words, that the power of the Commission is to fix and determine reasonable rates, and that when a rate is found to be reasonable it is the proper rate to require, both as a maximum and a minimum. But it is believed that this argument is wholly unsound and overlooks the fact that the question of whether or not a rate is reasonable must always be determined with reference to some standard stated or assumed. Until the passage of the Transportation Act, this standard was injustice to the shipper: in other words, the carrier was not to exact more than was just. But, as pointed out at the outset of this discussion, this standard

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passenger fares to be maintained on the level prescribed for interstate fares. See, for example, Rates, Fares and Charges of the New York Central R. R. Co., 59 I. C. C. 290 (1920); Intrastate Rates within Illinois, 59 I. C. C. 350 (1920); Wisconsin Passenger Fares, 59 I. C. C. 391 (1920), etc. The power to issue such orders was sustained in Railroad Commission of Wisconsin *v.* C. B. & Q. R. R. Co., 42 Sup. Ct. Rep. 232 (1922).

[38] 68 I. C. C. 161 (1922).

[39] This principle might be applied by the Commission in the case of demurrage rules which it thought unduly liberal, and therefore likely to reduce the efficient use of the carriers' equipment. It is also interesting to note that somewhat similar considerations contributed to persuade the Commission to decline to permit a reduction of the carload minimum applicable on shipments of sugar. Carload Minimum Weight on Sugar between Western Points, 62 I. C. C. 510 (1921). See also Reconsignment of Lumber and other Forest Products, 73 I. C. C. 404 (1922).

affords no help whatever in determining whether a rate is too low to be reasonable.

In addition, the selection of a reasonable rate has been held to involve a "flexible limit of judgment";[40] that is to say, no particular rate is definitely and certainly the one and only reasonable rate to apply, but within certain limits any one of a number of rates might be selected. The minimum rate power involves the determination of the lower limit.

This conclusion is confirmed by the provisions of Section 15 of the Interstate Commerce Act granting the minimum rate power,[41] which authorize the Commission to prescribe the "maximum *and* minimum" to be charged. This language clearly indicates that the Commission, if it does not prescribe a specific rate, may indicate two different limits within which the rates must be fixed by the carrier, and, by its terms, shows that these limits are distinct.

It would seem, therefore, that the minimum rate power may be exercised by the Commission with reference to conditions obtaining on the line of the carrier whose rates are under consideration where these conditions indicate, (*a*) that the rates are so low as to involve a loss, or to create little, if any, profit, so as to tend, in some measure, to disable the carrier from properly performing its public duties, (*b*) that the rates are so low as to prefer the traffic to which they apply, and to tend to cast an undue burden of the transportation cost on other traffic, (*c*) that the rates as compared with other rates of the same carrier, or rates to which it is a party, are so low as to create an undue preference in favor of certain shippers or localities, and (*d*) that the rates are so low as to tend to create unsatisfactory operating conditions.

B. *The Minimum Rate Power as Affected by Considerations Relating to Other Carriers than the Carrier whose Rates are Regulated.*

Cases of this class present a difficult problem, particularly since the authority of the Commission to regulate rates has

[40] Atlantic Coast Line *v.* North Carolina Corp. Commission, 206 U. S. 1, 26 (1906).

[41] 41 STAT. AT L. 456, 484-485.

been exercised, until the passage of the Transportation Act, with reference to conditions prevailing only on the line of the carrier whose rates are regulated. In fact, in *Central Railroad of New Jersey* v. *United States*,[42] the Supreme Court of the United States denies the power of the Interstate Commerce Commission under Section 3 of the Act, even since the amendments of the Transportation Act, to require railroads to establish a transit privilege on their lines because such a privilege is applicable on other lines of railroad, and this in spite of the fact that the railroads affected by the order were parties with such other carriers to joint rates, and in spite of the further fact that the transit privilege available on such other railroads put shippers on the lines of the defendant carriers at a competitive disadvantage. Does the minimum rate power enable the Interstate Commerce Commission to regulate the rates of carrier *A* because of conditions prevailing on the line of carrier *B?* Cases which involve this question are coming before the Commission with increasing frequency, and are of unusual importance from the viewpoint of the commercial interests of the country. Thus, there is pending before the Commission a controversy as to the rates on sugar from the Atlantic Seaboard ports to Chicago and related territory as compared with rates to the same territory from the Gulf of Mexico and South Atlantic ports.[43] The carriers operating from the Atlantic Seaboard undertook to make a reduction of 3 cents per hundred pounds in the sugar rates from this territory, action which was promptly protested by the southern carriers operating from the Gulf of Mexico. The southern carriers, in addition to the protest, answered with a 3 cent reduction in the rates from the Gulf ports. The Interstate Commerce Commission suspended both reductions[44] and is engaged in considering whether either reduction or both should be permitted to take effect. The controversy, as presented to the Commission, is confined to the relative adjustment, and no material evidence has been introduced tending to show

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[42] 42 Sup. Ct. Rep. 80 (1921).

[43] Arbuckle Brothers *v.* P. R. R., *et al.*, I. C. C. Docket No. 13098.

[44] Sugar from Eastern points to C. F. A. Territory, I. C. C., I. & S. Docket No. 1443; Sugar from Southern points to St. Louis and related points, I. C. C., I. & S. Docket No. 1457.

whether the reduction would or would not be justified if, in the one case, no sugar moved from the Atlantic ports, and in the other case, no sugar moved from the Gulf ports.

Again, there has been a similar controversy involving the salt rates from Louisiana mines to Chicago, St. Louis, and intermediate main-line points. Here the controversy arose between the lines operating from Louisiana and the shippers they serve, on the one hand, and the lines bringing salt to Chicago from the East and the Southeast and their shippers, on the other hand.[45]

Again, an important controversy grew out of a proposed reduction in the rates applicable on ex-lake iron ore from the Lake Erie ports to the blast furnaces in Pennsylvania, etc. Furnaces at Buffalo protested the reduction because, since they receive their ore at the lake, they pay no rail charges from the lake ports to their furnaces, and would secure no advantage from such a reduction, while their competitors in Pennsylvania, etc., would save a considerable sum in reduced freight charges. The furnaces at the lake ports contended further that the reduction in the ore rates would operate to preclude or retard the reduction in the rates on coal and coke to their furnaces, and that these rates were of vital importance to them.[46]

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[45] In this case the Commission declined to approve a low rate proposed by the carriers serving the salt mines in Louisiana. Salt from Louisiana Mines to Chicago, etc., 66 I. C. C. 81 (1922); same case upon re-argument, 69 I. C. C. 312 (1922).

[46] Trunk Line and Ex-Lake Iron Ore Rates, I. C. C. Docket, I. & S. No. 1514. It is interesting to note that this controversy had its inception in the action of the Lehigh Valley Railroad Company in reducing its rate on iron ore (imported) from Constable Hook to Bethlehem. This at once precipitated a demand from other furnaces in Pennsylvania and elsewhere for a reduction in their ore rates; and since these furnaces procure their ore in the Northwest, for the most part, and bring it down the lakes, the rates they sought to have reduced were the rates applicable on such traffic from the lower lake ports to their furnaces. Thereupon the Buffalo furnace men protested on the ground that such a reduction would be of no benefit to them, and should not be made unless coincident with the reduction of coal and coke rates. Such a reduction would have benefited them to a greater extent than most of their competitors, but it is obvious that a reduction of coal and coke rates would cause a tremendous depletion of the carriers' revenues and would affect an enormous traffic having no relation to the production of pig iron. The case discloses the extent to which a single rate reduction may disturb existing rate structures. This case has been decided by the Commission since the preparation of this article, 69 I. C. C. 589 (1922). See *infra*, note 61.

See also Lackawanna Steel Co. *v.* P. R. R. Co., *et al.*, I. C. C. Docket No. 13445, not yet decided.

Is the Interstate Commerce Commission clothed with authority, under the Act, to prescribe minimum rates because of conditions prevailing, not on the line of the carrier whose rates are regulated, but on the lines of other carriers?

1. *The Commission's authority under Section 3 of the Interstate Commerce Act prohibiting undue preference is not enlarged by the minimum rate power so as to enable it to hold unlawful the rates of one carrier because of what is done by another carrier.*

The essential characteristic of discrimination or undue preference has been the different treatment of two patrons by the same public service corporation. Thus, if carrier *X* maintains a rate of 60 cents per ton on a commodity moving between *A* and *B*, it is not guilty of discrimination although carrier *Y* moves the same traffic from point *C* to *B* — approximately the same distance and under the same conditions — for only 30 cents per ton. *Y*'s charge may be evidence of what would be reasonable, but *Y*'s act cannot make *X* guilty of an illegal act.

This principle was definitely sustained by the Supreme Court of the United States in its recent decision in *Central Railroad of New Jersey* v. *United States*.[47] In that case the Court set aside an order of the Interstate Commerce Commission requiring the establishment of a transit privilege at a point on the lines of The Pennsylvania Railroad Company and the Central Railroad Company of New Jersey, because at points *on the lines of other carriers*, but with which these carriers were parties to joint rates, such privilege was allowed. The Court says:

"It is urged that, while the undue prejudice found results directly from the individual acts of Southern and Midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under section 3 to remove discrimination so practiced. See *St. Louis & Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. . . . But participation merely in joint rates does not make connecting carriers partners. They can be

[47] 42 Sup. Ct. Rep. 80, 83 (1921).

held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination, as where a lower joint rate is given to one locality than to another similarly situated. *Penn Refining Co.* v. *Western N. Y. & P. R. R. Co.*, 208 U.S. 208, 221, 222, 225. . . . Compare *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission*, 181 U.S. 1, 18. . . . If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of section 3. What Congress sought to prevent by that section as originally enacted was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of section 3."

The concluding statement in this quotation is of peculiar significance in view of the fact that the Commission, in its decision, had asserted its authority because of "the enlarged powers conferred upon us by the Transportation Act, 1920." [48] And in a companion case, decided at the same time, it had said: "By the Transportation Act, 1920, our powers were greatly enlarged and among other things we have been given *authority to establish minimum rates*": [49] so that the possible relation of the minimum rate power to the question of discrimination was definitely before the Supreme Court.

It results that the Commission should not be able, on this ground alone, to exercise the minimum rate power against *Y* in the case supposed. The shipper at *A* is unable *in his own right* to challenge the *relation* between the two rates, when they are maintained by different carriers; but it does not necessarily follow that the relation cannot be challenged at all.

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[48] American Creosoting Co. *v.* Director General, 61 I. C. C. 145, 151 (1921).

[49] Southern Hardwood Traffic Ass'n. *v.* Director General, 61 I. C. C. 132, 141 (1921).

2. *A rate may be unduly low if, considering the relative service of two carriers, it tends to cause an unfair diversion of traffic.*

Here debatable ground is reached, but it is believed that the principle stated in the caption will ultimately prove an accepted basis for the exercise of the Commission's minimum rate power.[50]

It must be remembered that the purpose of the Transportation Act, 1920, is "to foster and preserve in full vigor both rail and water transportation," and that in its efforts to accomplish this object in the case of the railroads the problem of the so-called strong and weak roads engaged its most serious attention.[51] How was it to secure for the people adequate service, and not accord the strong roads rates unreasonably high? The solution adopted involved the grouping of the railroads by the Interstate Commerce Commission, the fixing of rates for the groups so as to enable the carriers as a whole in each of such groups to earn a fair return upon the aggregate value of the railway property held for and used in the service of transportation, and the so-called re-capture clause under which the Government undertakes to recover one half of the excess from any carrier earning more than six per cent upon the value of its property used in the service of transportation.[52]

In connection with this plan, and in connection with the other changes in the Act, the minimum rate power is conferred, and

[50] In the following cases the Commission seems to consider relevant the question whether a proposed reduction tends to bring about an unfair diversion of traffic from one carrier to another: Class and Commodity Rates from Chicago, 68 I. C. C. 74 (1922); Grain from Illinois Central Railroad Points to New Orleans, 69 I. C. C. 38, 42 (1922).

[51] See, for example, the report of the Senate Committee on Interstate Commerce accompanying the bill presented to the Senate November 10, 1919 (Report No. 304). The hearings had before the Committee on Interstate and Foreign Commerce of the House of Representatives during 1919 contain abundant references to this subject. And in the report submitted in connection with the House Bill (Report 456) Mr. Esch from the Committee on Interstate and Foreign Commerce said (page 10):

"By the application of minimum as well as maximum rates to permit a longer or weaker line to get a greater share of the business than heretofore, and with the initiative in the commission to establish joint rates and through routes, and the division of the rates, would still further aid the short or weaker lines."

[52] 41 STAT AT L. 456, 488–489.

it seems clear that the general purposes of the Act would be advanced by an exercise of the power in such a way as to prevent reductions of rates which would tend to bring about unfair and undesirable diversions of traffic. If, for instance, a strong line should reduce rates to low levels so as to attract traffic from a relatively weak line and thereby hinder the weaker line from earning a return sufficient to enable it to render adequate service to its patrons, it seems manifest that the policy of the Act would be defeated.

And the same conclusion is probably correct if the effect would be to cause traffic to move by a long and expensive route when, without detriment to the public, it might move by a shorter and more direct route. The sugar rate case, suggested at the outset,[53] is a helpful illustration. Is it likely to foster and preserve the rail service of the country, to allow a rate structure which will tend to cause Chicago to secure its sugar supply from the Pacific coast with a resulting rail haul of 2400 miles for a relatively low rate, when, for a lower rate, it can secure the sugar from the East and utilize a rail haul of only 900 miles? In any event, are these not proper considerations for the Commission to take into view in determining whether rates are too low? Should it not be able to condemn as too low a rate which tends to divert traffic to a longer route, or one involving greater expense for some other reason, unless countervailing reasons appear to justify a different conclusion?

3. *A rate may be unduly low if it tends to force undue reductions on the lines of another carrier with resulting loss of revenue.*

This principle is little more than a corollary of the one just discussed, but it assumes that if the one carrier is permitted to establish a low level of rates, the other carrier will decline to allow the diversion of traffic and will "meet the cut" with the immediate prospect of a "rate war," and the consequent loss of revenue tending to impair its ability to properly serve the public.[54]

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[53] *Supra*, p. 21.

[54] In the following cases the Commission makes reference to the detrimental effect of proposed reductions on an existing rate structure and the revenues of

It is conceivable that a certain reduction of rates on the lines of carrier *X*, if not followed by reductions on the lines of the other carriers, might produce additional net revenue for carrier *X* because of the diversion of traffic from other railroads; and yet, if such reduction should bring about a corresponding reduction on the competing lines, it is clear that the ultimate result would be a continuance of the original relative adjustment but at the expense of a substantial loss of earnings all around. To avoid this, the Commission should be able to intervene, and, having determined the proper relative alignment of the rates, fix them at a given level.[55] Again, a carrier, because of the fact that it transported only a small amount of a given tonnage, as for instance, anthracite coal, might regard it as a desirable policy to reduce the rates on that commodity because of the public satisfaction which ordinarily follows any such reduction. It would regard the loss of revenue as more than off-set by the resulting good will which it would count upon to secure other traffic. But such a reduction might tend to break down the rates of other carriers vitally dependent on the income from this traffic, so that, having regard to the interests of the carriers as a whole, and to the interests of the public, which in this respect are bound up with those of the carriers, the policy might

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other carriers presumably considering such evidence relevant to the propriety of proposed reductions: Oil from Texas Ports, 63 I. C. C. 74, 77 (1921) — compare decision on re-argument, 69 I. C. C. 345 (1922), reviewing the first decision; Coal from Detroit, Toledo & Ironton R. R. Mines, 64 I. C. C. 564 (1921); Salt from Louisiana Mines to Chicago, 66 I. C. C. 81, 90–91 (1922); Reduced Rates on Coal to Kansas City, Mo., 66 I. C. C. 457, 467 (1922); same case on re-argument, 69 I. C. C. 363 (1922); Coal from Kentucky, etc., to Southern Railway Points in Indiana and Illinois, 68 I. C. C. 29 (1922); Coal from Wyoming Mines, 68 I. C. C. 254 (1922); Petroleum and its Products from Shreveport, 68 I. C. C. 564 (1922); Salt from Louisiana Mines to Chicago, 69 I. C. C. 312, 316 (1922).

[55] It is difficult to escape the conclusion that this power must be conceded if the Commission is to comply with the requirements of the law relative to establishing a rate structure which will produce a certain return and if the purpose of Congress to foster rail and water transportation is to be accomplished. This is probably the explanation of the Commission's refusal to sanction the reduction of the rates on salt from the Louisiana mines; Salt from Louisiana Mines to Chicago, etc., 66 I. C. C. 81 (1922), same case on re-argument, 69 I. C. C. 312 (1922), although the Commission is not very explicit as to the principles on which it relies.

defeat the purpose of Congress that railroad rates shall yield a fair return.[56]

Here, it is believed, is found the justification for the action of the Commission in the matter of the rates established by Henry Ford's railroad, the Detroit, Toledo & Ironton Railroad,[57] which attracted public attention at the time of the proposed reduction, although the Commission alludes principally to the effect of the reduction in creating undue preference.

4. *A rate may be unduly low if it tends to force reductions in the rates on the same commodity on the lines of another carrier, and such reductions are likely to cause increases in the rates on other traffic so as to create an unfair distribution of the burden of the cost of transportation.*

A reduction in rates on a given commodity on carrier *X* might not tend to create increases on other traffic on the line of that carrier because the volume of the given traffic moving on that carrier might be relatively trivial; but, because of the effect of such reduction on the lines of carriers transporting large volumes of such tonnage, it might readily happen that the tendency would be to force an increase in their rates on other commodities, and thus create an unfair distribution of the transportation expense as among the different commodities transported by the carriers.[58]

5. *The minimum rate power may not be exercised to neutralize natural advantages.*

It seems clear that the power may not be exercised for the purpose of equalizing competitive industries which are not naturally on an equal basis, or of neutralizing or destroying advantages of location which naturally exist. In other words, this principle, which has become well established in connection with

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[56] The practical aspect of this suggestion is obvious, since, as is well known, anthracite coal constitutes a large part of the tonnage of some of the important eastern railroads; and yet a reduction in the anthracite rates by a competing carrier might easily force a reduction in the entire rate structure irrespective of the fact that the tonnage of such competing carrier was relatively light.

[57] Coal from Detroit, Toledo & Ironton R. R. Mines, 64 I. C. C. 564 (1921).

[58] This is believed to be a sound principle, though, thus far, it does not seem to have been involved in the cases before the Commission.

the exertion of the maximum rate power,[59] must also control the exercise of the minimum rate power, since any other construction would mean the grant to the Interstate Commerce Commission of a power, according to its judgment and without regard to transportation conditions on the railroads or the natural location of industries, to determine what communities should be the recipients of transportation favors.

In other words, to recur to the illustration suggested in an earlier part of the discussion, if the city of *B* is served by two railroads, *X* and *Y*, and the *X* railroad maintains from point *A* a rate on a given commodity of 60 cents per 100 pounds, whereas the *Y* railroad, from a point equally distant on its road, maintains a rate of 30 cents per 100 pounds, both movements being interstate, the Interstate Commerce Commission would now be empowered to determine that the 30 cent rate was too low, and should be raised. In doing this, however, its action should be predicated upon the fact that the transportation conditions of the two railroads were relatively similar, and that, having regard to these conditions, a parity of rates would be proper, since the rate on the *Y* railroad was unduly low and tended to deplete the earnings of that carrier and consequently to defeat the purpose of the Interstate Commerce Act that there should be a fair return on the value of the property of the carriers held for and used in the service of transportation. Or the lower rate might be condemned because it tended to create unfair competition as between the carriers, having regard to the relative transportation conditions on the two lines. If no such effect would result, and if there would be no tendency to break down the rates of the *X* railroad, the situation would seem to be controlled by the principle established by the Supreme Court in the case of *Central Railroad of New Jersey* v. *United States*,[60] *supra*, and there would be no basis for relief.

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[59] Saginaw Board of Trade *v.* Grand Trunk Ry., 17 I. C. C. 128, 137 (1909); Northern Pine Manufacturers Ass'n *v.* C. & N. W. Ry., 33 I. C. C. 360, 363 (1915); G. W. Sand & Gravel Co. *v.* C. M. & St. P. Ry., 45 I. C. C. 529, 530 (1917); Sloss, Sheffield S. & I. Co. *v.* L. & N. R. R. Co., 46 I. C. C. 558, 562–563 (1917), etc. *Cf.* Coal from Wyoming Mines, 68 I. C. C. 254, 258 (1922); I. C. C. *v.* C. R. I. & P. Ry., 218 U. S. 88 (1910); Southern Pacific Co. *v.* I. C. C. 219 U. S. 433 (1911).

[60] 42 Sup. Ct. Rep. 80 (1921).

Similarly, if a haul on the *X* railroad should be over a mountainous route involving extraordinary expense of operation, while a haul on the *Y* railroad should be over a water-level route involving a simple and inexpensive operation, so that the Commission regarded the adjustment of rates as reasonably reflecting the difference in operating conditions, it seems clear that the Commission would not be justified in requiring a parity of rates, no matter how serious the competition between the producers at the two points, and no matter how certain it might be that the rate structure would ultimately drive the one industry out of business.

Summarizing this branch of the discussion, it would seem that the minimum rate power may be exercised by the Commission with reference to conditions prevailing on the lines of carriers other than the carrier whose rates are under consideration, (*a*) not to neutralize or destroy natural advantages and (*b*) not merely because the rates would constitute a violation of the prohibition against undue preference if the two carriers were one, but (*c*) where the reduction or low level of rates would tend to unduly deplete the earnings of another carrier because of an unreasonable diversion of traffic, or (*d*) to unduly deplete the earnings of another carrier by forcing corresponding reductions on its road, or (*e*) to cause an unfair distribution of the cost of transportation on the lines of other carriers. Grounds (*c*) and (*d*) constitute what might be described as instances of a species of unfair or unwise competition, while ground (*e*) finds its purpose in the desire that the cost of transportation service shall be reasonably distributed among the community.[61]

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[61] Since this article was written the Commission has decided the case of the Trunk Line and Ex-Lake Iron Ore Rates, referred to above at page 22. A paragraph from the opinion, while somewhat long, is sufficiently important to justify quotation in full:

"We, therefore, find the suspended rates on ex-lake ore unreasonable and unlawful, and by order shall require their cancellation. We find them unreasonable and unlawful for the reason that in relation to rates in general, and in relation to rates closely affiliated, such as on coal, they would tend to cast an undue burden upon other traffic; that they would be unduly prejudicial to ore traffic from mines in eastern trunk-line territory, so far as the same carriers participate in the interstate carriage of both ex-lake and local mine ore traffic; that they are unlawful inasmuch as their establishment would jeopardize the rates on a large volume of other heavy-loading low-grade traffic which we have initiated under the authority of section 15a of the interstate commerce act with the intent that the carriers in the rate groups by us established

These principles disclose nothing revolutionary, since the law recognizes that competition may be regulated;[62] and it is difficult to find any basis for proper objection to the conclusion that the relation of the public interest to competition changes with changing economic conditions. There has been a growing tendency to regard unregulated competition as seriously detrimental to the economic well-being of the community; and the Supreme Court seems to regard the question whether it shall be fostered or restrained as within the field of legislative discretion and not subject to debate in the courts.[63] That the charges of a public service corporation are subject to regulation is a firmly established principle of constitutional law, and it can hardly be regarded as an extension of this principle to hold

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shall 'under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.' This rate of annual return we have fixed at 5.75 per cent, a rate of return which certain of the respondents have protested as inadequate, and which, if our judgment upon the effect of the proposed reduction in ex-lake ore rates is correct, the carriers are hereby likely to further reduce and jeopardize. We have only recently rejected tariffs of certain of the respondents intended to establish on three days' notice a further 10 per cent reduction over the 28 per cent reduction already in effect in some of the eastern and import rates, notably the rate from Constable Hook to Bethlehem. We mention this fact in connection with the reductions on ex-lake ore here proposed by the carriers, in order to make clear that in our judgment our authority under section 15a, in the exercise of our power to prescribe just and reasonable rates to 'initiate, modify, establish or adjust' rates is not a mere transitory authority to establish in the first instance a general rate structure calculated to produce a fair return, but is a continuing authority to see that such a rate structure shall not be undermined and its purpose thwarted by new rates, either increases or reductions, proposed by particular carriers for the purpose of augmenting the traffic on certain carrier lines, or on certain descriptions of traffic, or for the immediate and special benefit of particular persons, companies, firms, corporations, localities, or particular descriptions of traffic, in disregard of the more general and seemingly inevitable consequences of such rates newly proposed. To upset or seriously to menace a general structure lawfully established suffices to make proposed rates calculated to effect such a disruption unreasonable and unlawful."

See 69 I.C.C. 589, 610–611 (1922).

This paragraph substantially supports the general theory of this article, and it is believed that the principles stated are sound.

[62] See, for example, Central Lumber Co. *v.* South Dakota, 226 U. S. 157 (1912).

[63] See, for example, International Harvester Co. *v.* Missouri, 234 U. S. 199, 209 (1914).

that the power of regulation may be exercised to prevent public disadvantage resulting from the effect of rate action by one carrier upon other carriers and ultimately upon the shipping public, as well as to prohibit rate action which is unreasonable in its direct effect upon the carriers' own patrons.

It has been suggested that the due process clause of the Fifth Amendment does not permit Congress to authorize the Interstate Commerce Commission to regulate rates on the line of one railroad because of conditions prevailing on the line of another railroad, but it is not believed that this contention has a substantial foundation; for if the jurisdiction to regulate competition may be regarded as established, there seems to be ample warrant for Congress to regard as inimical to the public interest competition which may tend to prevent the carriers from earning such a return as would enable them to maintain a transportation service adequate to the needs of the community. The prohibition is not in the interest of the carriers, but in the interest of the public. It involves no stretch of constitutional principles to hold that no carrier should be permitted to conduct its own affairs so as to jeopardize a federal policy which, for its success, must include all the carriers of the country.

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